IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT KNOXVILLE
July 28, 2009 Session

STATE OF TENNESSEE v. CARY M. DOTSON

Appeal from the Circuit Court for Rhea County
No. 16009 J. Curtis Smith, Judge

No. E2008-02516-CCA-R3-CD - Filed October 6, 2009

The defendant, Cary M. Dotson, entered a plea of guilty in the Rhea County Circuit Court to one count of theft of property valued at $60,000 or more, a Class B felony, *see* T.C.A. §§ 39-14-103, -105(5) (1997). The trial court ordered the agreed eight-year sentence to be served in the Department of Correction. It is from the imposition of a fully incarcerative sentence that the defendant appeals. Discerning no error, we affirm the judgment of the trial court.

Tenn. R. App. P. 3; Judgment of the Circuit Court Affirmed

JAMES CURWOOD WITT, JR., J., delivered the opinion of the court, in which JOSEPH M. TIPTON, P.J., and D. KELLY THOMAS, JR., J., joined.

Leonard M. "Mike" Caputo, Chattanooga, Tennessee, for the appellant, Cary M. Dotson.

Robert E. Cooper, Jr., Attorney General and Reporter; Matthew Bryant Haskell, Assistant Attorney General; J. Michael Taylor, District Attorney General; and James W. Pope, III, Assistant District Attorney General, for the appellee, State of Tennessee.

OPINION

On January 17, 2008, the defendant, Cary M. Dotson, entered a "best interests"[1] plea of guilty pursuant to a plea agreement with the State to one count of theft of property valued at $60,000 or more in exchange for an agreed sentence of eight years with the manner of service of the sentence to be determined by the trial court. The "official version" of the offense contained within the presentence report provides as follows:

> On October 8, 2002[,] the defendant, Cary M. Dotson, was charged with theft of property over $60,000.00 in Rhea County, Tennessee.

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[1] In *North Carolina v. Alford*, 400 U.S. 25, 37, 91 S. Ct. 160, 167 (1970), the United States Supreme Court held that a criminal defendant may enter a guilty plea without admitting guilt if the defendant intelligently concludes that his best interests would be served by a plea of guilty.

A calculation of damages report by D. Michael Costello, C.P.A. concluded the following:

During the time period of January 1, 1999[,] through the termination of employment of [the defendant] on May 31, 2002, Kwik Kash, LLC suffered damages in the form of lost income and commissions paid in excess of commissions actually earned. The report states the defendant committed the theft in three different ways: 1. Income was recorded as received on customer title pawn tickets but no corresponding cash deposit was reflected on cash drawer detail report, 2. Income from customer checks was entered in the computer as received but no corresponding deposit appeared on deposit slips and 3. Commission[s] paid to the defendant were in excess of commissions actually earned because draws against commissions were not deducted by the defendant when he calculated the monthly commission he had earned.

. . . . The report calculated that the total missing cash from the[] title pawn tickets was $28,010.00.

Lost income related to missing checks . . . . is $129,045.00.

As manager of the Kwik Kash location the defendant was responsible for preparing the payroll. His compensation was dependent on the monthly gross profit for his store because his total compensation for the year was to equal 25% of the store's gross profit for the year. . . . Using the tax returns for Kwik Kash for the years 1999 through 2002 the report calculated 25% of gross profits and compared it to the total of commission and advance checks the defendant wrote out to himself as store manager. The report calculated that over the course of those three years the defendant wrote himself checks that exceeded the amount of the 25% of gross profit by $70,555.00.

In addition[] to the previously listed thefts the report calls into question $341,995.83 worth of checks made payable to "cash" signed and endorsed by the defendant. The defendant did not keep accurate daily records of the cash balance on hand at the Dayton location, so it was not possible to determine how much of that cash was actually used to replenish the cash register at the Dayton store.

. . . .

In summary, the total damages as calculated by the report and based on the information above is $617,115.00.

The presentence report also showed that the 45-year-old defendant was employed at the time of the sentencing hearing and that he had custody of his oldest daughter and paid child support for his youngest daughter. A "DD-214" provided to the preparer of the presentence report reflected that the defendant served in the United States Air Force from October 7, 1982, until October 6, 1988, and that he was honorably discharged after achieving the rank of sergeant.

The written sentencing memorandum filed by the trial court reflects that the trial court denied probation and other alternative sentencing based upon the need to avoid depreciating the seriousness of the offense given the excessive amount of money involved, *see* T.C.A. § 40-35-103(1)(B) ("Confinement is necessary to avoid depreciating the seriousness of the offense . . . ."), the need for deterrence, *see id.* ("[C]onfinement is particularly suited to provide an effective deterrence to others likely to commit similar offenses . . . ."), and the fact that the defendant committed the theft in this case while on judicial diversion, *see id.* § 40-35-103(1)(C) ("Measures less restrictive than confinement have frequently or recently been applied unsuccessfully to the defendant . . . .").

In this appeal, the defendant contends that the trial court erred by ordering a fully incarcerative sentence. He asserts that the trial court improperly relied on the need for deterrence and to avoid depreciating the seriousness of the offense when no evidence reflected the presence of either need.

When considering a challenge to the manner of service of a sentence this court conducts a de novo review with a presumption that the determinations of the trial court are correct. T.C.A. § 40-35-401(d) (1997). This presumption, however, "is conditioned upon the affirmative showing in the record that the trial court considered the sentencing principles and all relevant facts and circumstances." *State v. Ashby*, 823 S.W.2d 166, 169 (Tenn. 1991). The appealing party, in this case the defendant, bears the burden of establishing impropriety in the sentence. T.C.A. § 40-35-401, Sentencing Comm'n Comments; *see also Ashby*, 823 S.W.2d at 169. If our review of the sentence establishes that the trial court gave "due consideration and proper weight to the factors and principles which are relevant to sentencing under the Act, and that the trial court's findings of fact . . . are adequately supported in the record, then we may not disturb the sentence even if we would have preferred a different result." *State v. Fletcher*, 805 S.W.2d 785, 789 (Tenn. Crim. App. 1991). In the event the record fails to demonstrate the required consideration by the trial court, appellate review of the sentence is purely de novo. *Ashby*, 823 S.W.2d at 169.

In making its sentencing determination in the present case, the trial court, at the conclusion of the sentencing hearing, was obliged to determine the propriety of sentencing alternatives by considering:

> (1) The evidence, if any, received at the trial and the sentencing hearing;
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> (2) The presentence report;

> (3) The principles of sentencing and arguments as to sentencing alternatives;
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> (4) The nature and characteristics of the criminal conduct involved;
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> (5) Evidence and information offered by the parties on the enhancement and mitigating factors in §§ 40-35-113 and 40-35-114; and
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> (6) Any statement the defendant wishes to make in the defendant's own behalf about sentencing.

T.C.A. § 40-35-210(b). The trial court should also consider "[t]he potential or lack of potential for the rehabilitation or treatment of the defendant . . . in determining the sentence alternative or length of a term to be imposed." *Id.* § 40-35-103(5).

Having pleaded guilty to a Class B felony, the defendant is not presumed to be a favorable candidate for alternative sentencing. *Id.* § 40-35-102(6).[2] Moreover, because, in this instance, the sentence imposed is eight years or less, the trial court was required to consider probation as a sentencing option. *See* T.C.A. § 40-35-303(a), (b). Sentencing issues are to be determined by the facts and circumstances made known in each case. *See State v. Taylor*, 744 S.W.2d 919, 922 (Tenn. Crim. App. 1987).

When examining a defendant's suitability for an alternative sentence, the trial court should consider whether:

> (A) Confinement is necessary to protect society by restraining a defendant who has a long history of criminal conduct;
>
> (B) Confinement is necessary to avoid depreciating the seriousness of the offense or confinement is particularly suited to provide an effective deterrence to others likely to commit similar offenses; or
>
> (C) Measures less restrictive than confinement have frequently or recently been applied unsuccessfully to the defendant[.]

T.C.A. § 40-35-103(1)(A)-(C). In addition, a defendant's potential for rehabilitation or lack thereof should be examined when determining if an alternative sentence is appropriate. *Id.* § 40-35-103(5).

The defendant is required to establish his "suitability for full probation." *State v. Mounger*, 7 S.W.3d 70, 78 (Tenn. Crim. App. 1999); *see* T.C.A. § 40-35-303(b); *State v. Bingham*,

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[2] In 2005, our legislature removed the presumption of favorable candidacy for alternative sentencing. *See* T.C.A. § 40-35-102(6) (2006).

910 S.W.2d 448, 455-56 (Tenn. Crim. App. 1995), *overruled in part on other grounds by State v. Hooper*, 29 S.W.3d 1, 9-10 (Tenn. 2000). A defendant seeking full probation bears the burden of showing that probation will "'subserve the ends of justice and the best interest of both the public and the defendant.'" *State v. Dykes*, 803 S.W.2d 250, 259 (Tenn. Crim. App. 1990) (quoting *Hooper v. State*, 297 S.W.2d 78, 81 (1956)), *overruled on other grounds by Hooper*, 29 S.W.3d at 9-10. Among the factors applicable to probation consideration are the circumstances of the offense; the defendant's criminal record, social history, and present condition; the deterrent effect upon the defendant; and the best interests of the defendant and the public. *State v. Grear*, 568 S.W.2d 285, 286 (Tenn. 1978).

In this case, the parties agreed that while employed as a manager at Kwik Kash, LLC, the 45-year-old defendant took at least $227,610 from his employer over the course of three and a half years. According to an accounting by Kwik Kash, the defendant employed at least three different methods to defraud the company of cash. Despite the large amount of money and extended period of the offense, the defendant pleaded guilty to a single count of theft of property valued at $60,000 or more in exchange for an agreed sentence of eight years, the minimum within the range. Moreover, the record also establishes that for at least part of the time that he was stealing money from Kwik Kash, the defendant was first released on bail and later placed on judicial diversion in an unrelated case. Given the exaggerated nature of the theft in this case, *see* T.C.A. § 40-35-103(1)(B); *see also State v. Trotter*, 201 S.W.3d 651, 655 (Tenn. 2006) (finding "that the circumstances [were] indeed offensive, excessive, and of an exaggerated degree" where "the defendants, over an approximate two-year period, stole nearly half a million dollars from Trotter's employer"), the leniency already afforded the defendant by the plea agreement, *see State v. Dwayne Anthony Dixon*, No. E2007-02237-CCA-R3-CD, slip op. at 6 (Tenn. Crim. App., Knoxville, Aug. 26, 2008) ("A sentencing court may consider a defendant's enjoyment of leniency . . . in awarding or rejecting alternative sentencing options."), and the defendant's commission of the theft while on conditional release, *see* T.C.A. § 40-35-103(1)(C); *see also State v. Candice Parrish*, No. W2008-02074-CCA-R3-CD, slip op. at 5 (Tenn. Crim. App., Jackson, Aug. 14, 2009); *State v. Doyle W. Pugh*, No. E2000-02488-CCA-R3-CD, slip op. at 3 (Tenn. Crim. App., Knoxville, Aug. 15, 2001), the trial court did not err by denying probation or other alternative sentencing.

Accordingly, the judgment of the trial court is affirmed.

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JAMES CURWOOD WITT, JR., JUDGE